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No. 90-1620

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ROBERT PEARSON, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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REPLY BRIEF OF PETITIONERS

RICHARD SWICK
1400 K Street, N.W.
Washington, D.C. 20036
(202) 842-0300

CARTER G. PHILLIPS
MARK D. HOPSON *
DANIEL E. MALJANIAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

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The United States argues that the conviction of petitioners for unlawful "assemblage" on the plaza of the United States Supreme Court building, 40 U.S.C. § 13k, should not be reviewed because no substantial First Amendment question is presented. To the contrary, the question presented follows naturally from this Court's decision in *United States* v. *Grace*, 461 U.S. 171 (1983), which invalidated the application of the same statute to peaceful protest conducted on the sidewalks surrounding the Court. The case also squarely presents the significant and recurring issue of what type of public property constitutes a public forum. Finally, the case unquestionably involves peaceful expressive conduct at the core of what the First Amendment protects and thus raises an important symbolic issue of the application of First Amendment principles in the area surrounding the building in which this Court sits to interpret those principles.

The government ignores the practical and symbolic importance of the issue presented and merely argues that

the holding below is correct. That limited response, which essentially disregards the reasons for granting the petition, warrants a brief reply.

1. The United States asserts that the Supreme Court plaza, unlike the perimeter sidewalk that surrounds the Court, is "functionally distinct" from areas such as public sidewalks, parks and other nonspecialized public places that traditionally are deemed public forums. Opp. 5-6. Although the Supreme Court building and grounds properly may be set aside for "specialized use," the plaza—the only area of the Court's grounds at issue here—is *in fact* used as a public area in which many persons "meet a friend for lunch, . . . take the air, or engage in any of the multitude of other purposes for which typical downtown streets are used." Opp. 6 (quoting *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 925 F.2d 576, 581 (2d Cir. 1991)). The plaza has built-in benches where persons often sit and relax while watching the fountains or the Capitol Building when the weather is pleasant. Moreover, at any given time, numerous people walk through the plaza either to go to the Court or to get from one part of Capitol Hill to another. Thus, for many people the plaza serves as an urban park or walkway area completely divorced from business at the Court.

Alternatively, the United States argues that even if the plaza is a public area, it is not a "public forum." This is so, the government suggests, because the "property is set aside for a specialized use that is incompatible with the unrestricted availability of that property for expressive activity by the public." Opp. 6. However, given the long tradition of the plaza's use for expressive activities—particularly by attorneys who often use the plaza for speeches and impromptu press conferences (Pet. App. 11a-12a, 33a-34a)—the suggestion that the plaza is not a traditional forum for expression of opinion regarding the Court and its work is without merit.

2. The United States further argues that, even if the plaza is a public forum, the court below correctly concluded that the flat prohibition in "Section 13k is a valid time, place, or manner restriction" (Opp. 9) because it was "narrowly tailored and served the significant interest of the government in preserving the integrity of the judiciary." Pet. App. 13a. In particular, the courts below (and now the United States) rely on the argument that the restriction is narrowly tailored to the " 'significant' governmental interest[]" in "preserv[ing] the appearance of the Court as a body not swayed by external influence." *Id.*; see Pet. App. 20a (Section 13k "susceptible to a narrowing construction, confining the scope of the clause to protection of the [Supreme Court] building and grounds and of persons and property within . . . , and to [preservation of] the appearance of the Court as a body not swayed by external influence") (internal quotations and citations omitted).[1]

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[1] Contrary to the government's suggestion, this case is unlike *Greer* v. *Spock*, 424 U.S. 828 (1976) (sidewalk inside a military base) or *Adderley* v. *Florida*, 385 U.S. 39 (1966) (prison grounds), where the "forum" in question was devoted solely to government business, and the speech in question threatened to interfere with that business in a meaningful way.

There is no question that Congress can take steps to "protect[] the Supreme Court from the disruption of its work" (Opp. 7) and prevent harm or threatened harm to the Court and its personnel. Opp. 11 n.8. Such interests, however, are not implicated in this case. There are statutes that specifically address such problems, see, *e.g.*, 18 U.S.C. § 1507 (picketing or parading to interfere with court business); 40 U.S.C. § 13j (use of "loud, threatening, or abusive language"), and Section 13k presumably could be construed to reach only those "processions" that are disruptive to the Court. The application of the statute to petitioners, however, has not been and could not be defended by the United States on the ground that petitioners were in any way noisy, disruptive, threatening or an interference with the business of the Court. To, the contrary, both courts below placed primary reliance upon the government's interest in avoiding the "appearance of the Court as a body not swayed by external influence" in upholding the application of Section 13k to petitioners, in the face of their First Amendment challenge. See Pet. App. 11a-13a, 20a-22a, 34a-35a, 43a.

The United States, however, fails to address petitioners' point that a "concern for sheltering and insulating the judiciary from the appearance of political influence" (Pet. App. 21a) can only be implicated by examining the *content* of the speech to determine if it gives rise to that "appearance." Pet. 15-18. The United States argues that the restriction on speech embodied in Section 13k is "viewpoint-neutral" because Section 13k is applicable to speech regardless of whether it praises or criticizes a decision of the Court. Opp. 8 & 11 n.8 (Section 13k does not discriminate "among particular viewpoints" or lead to prosecution "because the government disagrees with the view they were attempting to [ex]press"); see Opp. 11 ("Section 13k applies in an even-handed manner regardless of the underlying subject matter or viewpoint of the demonstration"). Thus, the United States submits that the restriction is "content-neutral" because the "government is not concerned with whether the public will be swayed by the primary message the demonstrators seek to convey, but, instead, with the 'secondary effects' of demonstrations on Court grounds—that is, the creation of the appearance that the Court is influenced by public pressures in deciding cases." Opp. 10-11.

With respect to the United States' argument that Section 13k is viewpoint-neutral, it is well-established that a speech restriction may be viewpoint-neutral without being "content-neutral." *Boos* v. *Barry*, 485 U.S. 312, 319 (1988). "Content neutral" speech restrictions are those that "are *justified* without reference to the content of the regulated speech." *Id.* at 320 (quoting *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)) (emphasis in original); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 782 (1989). There is no question that the justification for Section 13k—*i.e.*, avoidance of the improper "appearance" that

may be created by certain speech—*necessarily* refers to the content of the prohibited speech.[2]

Thus, it is irrelevant whether the statute would be applied to prohibit positive as well as negative "views of the Court or the Court's decisions" (Opp. 11 n.8), and the critical point is that the statute "is justified *only* by reference to the content of [the] speech." *Boos*, 485 U.S. at 321. The government's effort to characterize the protection of public perception as a permissible "secondary effect[]" of a restriction on speech (Opp. 11) is misplaced because "[l]isteners' reactions to speech are not the type of 'secondary effects'" that properly may be addressed in an otherwise content-neutral statute. *Boos*, 485 U.S. at 321. Given the asserted justification for Section 13k, the restriction on speech should have been upheld only if the government sustained its burden of demonstrating that the restriction "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Neither court below even addressed whether Section 13k could meet this exacting standard.

Finally—regardless of the applicable standards, it is at least unclear how the plaza could be distinguished from the sidewalk in terms of protecting the public's perceptions, and this Court in *Grace* unanimously rejected such government interests as inadequate to sustain the constitutionality of a similar ban on expressive activity. At the very least, this Court's analysis in *Grace* casts doubt upon the United States' assertion that First Amendment activity on the plaza can be restricted in the manner set out in Section 13k, and review by this Court is therefore warranted.

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[2] The only speech that arguably can "create the impression that the Court is subject to influence by public demonstrations" (Opp. 11 n.8) is speech that says something about the content of this Court's decisions.

3. Petitioners have challenged as impermissibly vague the "narrowing construction" of the assemblage clause of Section 13k adopted by the courts below, "confining the scope of the clause to," *inter alia*, "the maintenance of proper order and decorum" and the preservation of "the appearance of the Court as a body not swayed by external influence." Pet. App. 20a. The United States, in its brief in opposition, does not dispute that the statute on its face is overbroad and that the narrowing construction adopted by the courts below was necessary. Opp. 4, 11-12; see Pet. App. 19a ("On its face, the congregation clause, which prohibits parading, standing, and moving in processions and assemblages" constitutes "an absolute ban on any group activity . . . not supported by the government's legitimate and important interests").

The United States argues, however, that Section 13k, as narrowed by the courts below, "is reasonably clear with regard to the conduct it reaches." Opp. 11. Without further explanation, the government asserts that the determination "whether persons engaged in a demonstration" constitute a threat to "decorum" or to the Court's appearance as a body removed from public opinion "is a sufficiently objective matter that the public and the officers charged with the statute's enforcement can determine with reasonable confidence what conduct is forbidden." Opp. 12.

Petitioners submit that Section 13k is not nearly so clear as the United States contends. It is not clear, for example, why petitioners' assembly for quiet prayer disturbed the "decorum" of the Court or its "appearance . . . as a body not swayed by external influence" (Pet. App. 20a) more than the familiar practice of attorneys assembling on the plaza following an oral argument to address supporters and the media. See Pet. App. 11a-12a. Indeed, the court below suggested that one (of two) "readily identifiable" "government concern[s] underlying Section 13k" was the prevention of the "use of [the plaza] as a

forum for voicing private views." Pet. App. 21a. There is no question that those attorneys who have used the plaza to share with the public and the media their views of a case or an argument are "voicing private views." Moreover, it is difficult to imagine that such speeches—particularly when made by a respected attorney (*e.g.*, an official of the NAACP, or even the Attorney General of the United States)—are any *less* likely to cause the public to perceive the Supreme Court as susceptible to outside influence than the conduct of petitioners in this case.

The simple fact is that the use of the plaza by attorneys and others to voice their "private views" on matters related to this Court is indistinguishable from the conduct of petitioners by any "objective standards." Indeed, the standards of "decorum" and "appearance" are so vague that virtually no objective standards exist. The absence of such objective standards "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). At the end of the day, only this Court can ultimately decide what type of speech is permissible in the area surrounding the building it occupies. For that reason alone, final review of these criminal convictions by this Court is appropriate.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD SWICK
1400 K Street, N.W.
Washington, D.C. 20036
(202) 842-0300

CARTER G. PHILLIPS
MARK D. HOPSON *
DANIEL E. MALJANIAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

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* Counsel of Record